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time retain the benefit of his lien, if the parties plainly so agree. The transaction is not illegal, and in this case the rights of third persons do not intervene. In the case in judgment the commissioner who examined the witnesses and the trial court found that such an agreement had been proved, and the evidence in the cause does not warrant this court in reversing that finding.

3. ASSIGNMENT—*Duty of assignee—Diligence—Loss—Collaterals.* It is the duty of the assignee of a bond to use due diligence to make the money out of those primarily bound for its payment, and if it is secured by a specific lien, to use like diligence to enforce such lien before he can have recourse on the assignor. If he fails to pursue this course it is incumbent upon him to show clearly that no loss or damage has resulted from his lack of diligence. If a collateral be lost through the supineness of the creditor, he must account for the loss to his own debtor.

MITCHELL AND OTHERS V. WITT, JUDGE.—Decided at Wytheville, July 5, 1900.—*Cardwell, J. Absent, Riely, J.*

1. CONSTRUCTION OF STATUTES—*In pari materia.* Statutes which are not inconsistent with one another and which relate to the same subject matter are *in pari materia* and should be construed together and effect given to them all, although they contain no reference to one another and were passed at different times.

2. MANDAMUS—*When refused.* The writ of mandamus will not be awarded where to do so would be fruitless and unavailing. If the respondent cannot perform the act required, or the court is unable to compel its performance, the writ will be denied.

3. ELECTIONS—*City council—Contest—Hustings court—Sections 160 and 1030 of Code—Officers.* The council of the city of Richmond, under the authority of sec. 1030 of the Code is the judge of the election, qualification and returns of its members, and also has the power to order elections and to fill all vacancies in that body. The Hustings Court of said city has no jurisdiction to decide a contest over an election of a member of that body, even though the contestant alleges that he cannot obtain justice before it. Members of the city council are in a certain sense officers, but the city officers referred to in sec. 160 of the Code are such as correspond to the officers of the respective counties and districts of the State, such as sheriffs, treasurers, clerks and attorneys for the commonwealth.

WILLARD V. WILLARD.—Decided at Wytheville, July 5, 1900.—*Cardwell, J. Absent, Riely, J.*

1. PROCESS—*Order of Publication—Right to show cause—Code, sec. 3233.* Under the provisions of section 3233 of the Code a non-resident defendant who has not been served with process nor appeared before a decree was rendered against him, but who petitioned to have the cause reheard within one year thereafter, has the right to file such petition and to plead or answer, in order to have any injustice done him in the proceedings corrected.

2. DIVORCE SUIT.—*Continuance—Amendments—Case in judgment—Cross charges.* In suits for divorce, courts are liberal in allowing continuances and suspensions of hearing to supply defects in the evidence or pleadings. In the case in judgment

it was error to refuse to allow appellant to amend her cross bill charging the appellee with additional recent acts of adultery. The evidence does not disclose a lack of proper diligence on her part.

NEWBURY V. BANK OF PRINCETON.—Decided at Wytheville, July 5, 1900. *Buchanan, J.* Absent, *Riely, J.*:

1. FRAUDULENT CONVEYANCES—*Notice to grantee—How proved.* If the grantee in a fraudulent deed had knowledge at the time of the conveyance of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally prompt him to pause and enquire before consummating the transaction, and such enquiry would have necessarily led to a discovery of the fact with notice of which he is sought to be charged, he will be considered to be affected with such notice, whether he made enquiry or not. But while the fact of notice may be inferred from circumstances, as well as proved by direct evidence, yet the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of *mala fides*. In the case in judgment such proof has not been furnished.

2. CHANCERY PRACTICE—*Suit to avoid conveyance—Notice of fraud before payment—Notice of execution against grantor.* In a suit to set aside a fraudulent deed, where it appears that the grantee acquired notice of the fraud before he had paid bonds given for deferred payments of purchase money, and also had notice of the plaintiff's execution against his grantor, a decree should be entered against the grantee in favor of the plaintiff for the amount of such bonds and the interest thereon from maturity.

CASH V. HUMPHREYS, RECEIVER.—Decided at Wytheville, July 5, 1900.—*Buchanan, J.*:

1. APPEAL AND ERROR—*Judgment lien—Amount in controversy—Title or boundary of land.* In a suit to subject lands to the payment of the lien of a judgment where the defendant appeals the jurisdiction of this court is regulated by the amount of the judgment. The "title or boundary of land" is not involved although the appeal be taken by one who is not the judgment debtor, and the controversy is over the liability of the land to the lien of the judgment.

NEWBERRY AND OTHERS V. FRENCH.—Decided at Wytheville, July 5, 1900.—*Harrison, J.* Absent *Riely, J.*:

1. SPECIFIC PERFORMANCE—*Doubtful title.* A purchaser of land at a private sale will not be required to pay his money for a defective or even doubtful title. This is especially true where the purchaser has contracted for a good and sufficient deed, which undertaking is not confined to the form of the deed, but includes a good title.

2. SPECIFIC PERFORMANCE—*Changed circumstances—Delay.* It is a general rule, applying to either vendor or vendee, that where there has been a change of circumstances or relations which renders the execution of the contract a hardship on the defendant, and this change grows out of or is accompanied by an unexcused